sufficient facts to require a conclusion of obviousness if the proper standard of law were applied to the facts in this case.

Second Question

Respondent is correct that PX 61 is not referred to in the Petition. PX 61 does contain some of the documents in question. Some of these documents are dated after the critical date (April 15, 1953) and could not be classified as prior art. The latest document in PX 61 is dated October, 1959. The seven articles of PX 61 were used in the cross-examination of deposition witness Clark. The seven articles of PX 60 were received at trial in the absence of Clark to contradict and impeach his prior deposition testimony. All fourteen articles of PX 60 and PX 61 were admitted into evidence without any showing that they were authoritative and reliable works on the grounds that they were relevant in connection with the state of the art. Respondent asserts that there is nothing unusual about all of this because "rulings (that the patentee may offer evidence of the state of the art *literature* in the same manner as the infringer) are common." (Respondent's brief, p. 13).

However, the cases relied on by Respondent do not support this assertion. For example, *Ludlum Steel Co.* v. *Terry*, 37 F2d 153 (N.D.N.Y. 1928) has never been cited for this proposition. In addition, the statements in the article in that case were found to be "authoritative" which would provide a foundation for its use under the Standard Treatise rule. *Watson* v. *Heil*, 192 F2d 982 (4th Cir. 1951), relied on by both the respondent and the Court of Appeals (Petition, p. 34a) is clearly not in point because it dealt

with the admissibility of proffered *testimony of witnesses* concerning the unsuccessful efforts of others in the prior art to produce the thing patented. Such live testimonial evidence of patentability is clearly admissible in patent cases. That is not this case where unproven documents were effectively declared the full probative equivalent of testimonial evidence. Reliance on *In re Fouriet*, 357 F2d 392 (CCPA 1966) is improper because that case concerned an appeal from the Patent Office and hence was an *ex parte* proceeding. As such, it was not governed by the rules of evidence which are applicable in the adversary system of jurisprudence practiced in the trial courts of this country.

Even assuming *arguendo* that a patent owner in a patent litigation may introduce testimony of witnesses relating to prior art patents and literature to show that the hypothetical man skilled in the art was led *away* rather than *toward* the subject matter of the patent in suit (there is no basis for such assumption in the Patent Statute, 35 United States Code, secs. 102 and 103), it does not follow that such documents can be used without additional proof as self-proving documents to contradict the factual testimony of an opposing witness. This is the reason that *Seymour v. McCormick*, 60 U.S. 96 (1896) is pertinent to the erroneously admitted evidence in issue. There, this Court held that although the Patent Statute makes admissible a prior art document to defeat the patent, the document is not evidence of the truth of its contents. Therefore, even if it were proper for a patent owner to introduce prior art publications in the same manner as is permitted by statute to the party opposing the patent, it would not be lawful to *use* the documents as evidence of the truth

of their contents. Such use was sanctioned in the present case and it substantially affected its outcome.

The Court of Appeals' evaluation of this problem can be seen in its statement that:

> "The trier of fact then has to choose which evidence is most likely true. To the extent the trier of fact rejects one witness's [sic] evidence in favor of another, he holds it is successfully "contradicted" and to this extent it is impeached." (Petition, p. 34a.)

The Court of Appeals thus considered it proper for the trier of fact in a United States District Court to reject the evidence contained in the testimony of Petitioner's witness in favor of the evidence contained in Respondent's unsworn and unproven published articles.

Petitioner's contrary view has been the core of its continuing objections which were overruled in the Courts below. Such error fundamentally affects the trial of cases in general, particularly patent cases, and deserves the attention of this Court.

CONCLUSION

The instant petition for a writ of certiorari should be granted.

Respectfully submitted,

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